

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE
RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.**

FILED BY CLERK

JULY 17 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FAWN S.,

Appellant,

v.

JACK S. and ROBERT S.,

Appellees.

2 CA-JV 2008-0030

DEPARTMENT A

MEMORANDUM DECISION

Not for Publication

Rule 28, Rules of Civil

Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 18326299

Honorable Jane L. Eikleberry, Judge

AFFIRMED

M. Valentine Schaffer

Tucson
Attorney for Appellant

Jack S.

Tucson
In Propria Persona

Peter G. Schmerl

Tucson
Attorney for Appellee Robert S.

H O W A R D, Presiding Judge.

¶1 Fawn S. appeals from the juvenile court’s March 2008 order terminating her parental rights to her seven-year-old son, Robert S. She contends she was denied due process in this private termination proceeding because the court “permit[ted Robert’s] attorney to act as *de facto* petitioner” at the termination hearing. We affirm.

¶2 We review constitutional claims de novo, *Emmett McLoughlin Realty, Inc. v. Pima County*, 212 Ariz. 351, ¶ 16, 132 P.3d 290, 294 (2006), but view the evidence in the light most favorable to affirming the juvenile court’s findings, *Vanessa H. v. Ariz. Dep’t of Econ. Sec.*, 215 Ariz. 252, ¶ 20, 159 P.3d 562, 566 (App. 2007). Because Fawn has alleged only procedural error on appeal, we limit our recitation of the facts.

¶3 In early 2006, the Child Protective Services division of the Arizona Department of Economic Security (ADES) removed Fawn’s five children, including Robert, from her care. Fawn’s other four children were adjudicated dependent after she admitted the allegations in an amended dependency petition. The juvenile court later granted ADES’s motion to terminate her parental rights to those children, and we affirmed that termination order on appeal. *See Fawn S. v. Ariz. Dep’t. of Econ. Sec.*, No. 2 CA-JV 2007-0094 (memorandum decision filed June 5, 2008).

¶4 After he was removed from Fawn’s custody, Robert was placed with his father, Jack S.¹ Jack was awarded sole custody several months later, and the juvenile court

¹Jack’s wife Cherie and their infant son also reside in the home. Cherie would like to adopt Robert if he becomes free for adoption.

dismissed allegations that Robert was dependent. In August 2007, Jack filed a pro se petition to terminate Fawn's parental rights to Robert, alleging she had neglected or abused and abandoned him. *See* A.R.S. § 8-533(A), (B)(1), (2). The court appointed counsel for Fawn as well as separate counsel to represent Robert in the termination proceedings. Jack continued to appear pro se, and Robert's counsel was charged with preparation of the joint pretrial statement.

¶5 At the termination hearing, Robert's counsel suggested the case would proceed most efficiently if the juvenile court permitted him to "present [his] case" first by conducting the initial examination of the witnesses Jack had listed in the pretrial statement. Fawn objected that Robert's counsel was "acting as Petitioner" and that Jack, as the actual petitioner, "need[ed] to urge and bring forth his own case" and "carry his burden" of proof. She argued permitting Robert to present evidence first was prejudicial because it could deprive her of an opportunity "to move for a dismissal at the close of [Jack's] case if he intends not to call any witnesses."

¶6 Similarly, Fawn argues on appeal that it was "fundamentally unfair and prejudicial" to permit Robert's counsel to present the evidence supporting termination of her parental rights. She acknowledges that Rule 66(D), Ariz. R. P. Juv. Ct., permits the presentation of evidence at a termination hearing to be "as informal as the requirements of due process and fairness permit," *see also* Ariz. R. P. Juv. Ct. 6, but she contends the manner of presentation approved by the juvenile court violated her right to due process by

relieving Jack of his burden of proving grounds for termination, *see* Ariz. R. P. Juv. Ct. 66(C) (petitioner has burden of proving allegations by clear and convincing evidence).

¶7 The burden of proof is separate from the order of presentation of evidence. Fawn provides no authority for her implicit suggestions that a petitioner may rely only on evidence he himself presents to prove grounds for termination or that counsel for the child is precluded from participating fully in the termination hearing. Our supreme court has directed the appointment of counsel for a child who is the subject of a termination proceeding whenever “such counsel would contribute to promoting the child’s best interest by[, for example,] . . . advocating the child’s position in the dispute or ensuring that the record be as complete and accurate as possible” *In re Yavapai County Juv. Action No. J-8545*, 140 Ariz. 10, 16, 680 P.2d 146, 152 (1984). Presentation of evidence by Robert’s counsel was consistent with the role envisioned by the supreme court, *see id.*, and the record corroborated counsel’s avowal that he was acting on behalf of his minor client.²

¶8 Arizona courts have long held that “[t]he order in which . . . evidence is offered, received or excluded, is in the sound legal discretion of the trial court,” and we will not reverse a decision directing the order of presentation absent a clear abuse of that discretion and a showing of prejudice. *Logia Suprema de La Alianza Hispano-Americana v. De Aguirre*, 14 Ariz. 390, 395, 129 P. 503, 506 (1913); *see also* Ariz. R. Evid. 611(a).

²Fawn does not dispute that Robert’s interests were aligned with Jack’s in supporting the petition to terminate her parental rights.

Assuming Jack would have called the witnesses he identified in the joint pretrial statement, we fail to see how the outcome of the hearing was dependent on whether Robert's counsel was the first or last to question them.

¶9 Nonetheless, Fawn argues the juvenile court denied her due process when it permitted Robert's counsel to conduct the initial examination of Jack's witnesses. In considering a question of procedural due process, we must weigh the importance of the private interest at stake, the risk that the challenged procedure resulted in an erroneous deprivation of that interest, the probable value of alternative procedural safeguards, and the potential burden on the government of providing those alternative procedures. *See, e.g., Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 33, 110 P.3d 1013, 1020 (2005), *citing Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). To be sure, Fawn has a fundamental liberty interest in parenting her children. *See id.* ¶ 24. But she has not cited any authority that she has a due process interest in the order of presentation of the evidence. And she has not even attempted to show that permitting Robert's counsel to take the lead in questioning Jack's witnesses increased the risk that her parental rights would be terminated in error or that requiring Jack to proceed first would have reduced that risk.³ If anything, Robert's counsel's participation contributed to the full development of the record, thus diminishing the risk of error. Fawn was represented by counsel and, as Robert points out on appeal, had every

³Without citation of authority, Fawn misstates the *Mathews* factors relevant to this inquiry and fails to address whether the challenged procedure increased the risk of an erroneous decision.

opportunity to cross-examine adverse witnesses and present her own evidence. *See Monica C. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 89, ¶ 18, 118 P.3d 37, 41 (App. 2005) (due process satisfied when parent had adequate notice of grounds for termination and opportunity to cross-examine witnesses and testify on own behalf).

¶10 In an appropriate exercise of its discretion, the juvenile court selected an expedient means of receiving the evidence without sacrificing procedural safeguards. Although Fawn may believe she was strategically disadvantaged by the court's decision to vary the traditional order of presentation, she was not denied due process. Finding neither legal error nor an abuse of discretion in the procedural decision Fawn challenges, we affirm the court's order terminating her parental rights to Robert.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

J. WILLIAM BRAMMER, JR., Judge